**Local 32B-32J, Service Employees International Union, AFL–CIO *and* Provident Operating Corp.** Case 29–CB–7508

July 19, 1991

## DECISION AND ORDER

BY MEMBERS CRACRAFT, DEVANEY, AND OVIATT

On March 8, 1991, Administrative Law Judge Eleanor MacDonald issued the attached decision. The Charging Party and the General Counsel filed exceptions and supporting briefs, and the Respondent filed a response to the exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

## ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

[1] The Charging Party and the General Counsel have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and, in adopting the judge's finding that the testimony of the Charging Party's counsel regarding an alleged request for negotiations with the Union on August 30, 1989, was not credible, we rely only on the judge's finding concerning the demeanor of the Charging Party's counsel as set out in the fourth paragraph of sec. II,C of the decision.

*Brian F. Quinn, Esq.* and *Rhonda P. Schechtman, Esq.*, for the General Counsel.

*Ira A. Sturm, Esq. (Manning, Raab, Dealy & Sturm)*, of New York, New York, for the Respondent.

*Robert M. Saltzstein, Esq.*, of Garden City, New York, for the Charging Party.

## DECISION

### STATEMENT OF THE CASE

ELEANOR MACDONALD, Administrative Law Judge. This case was tried in Brooklyn, New York, on December 13, 1990. The complaint alleges that the Union, in violation of Section 8(b)(3), refused to bargain with Provident Operating Corp. The answer denies the material allegations of the complaint.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Charging Party, I make the following[1]

[1] Certain errors in the transcript are noted and corrected.

### FINDINGS OF FACT

#### I. JURISDICTION

Provident Operating Corp., a New York corporation, with its principal office in the county of Queens, in the city and State of New York, is engaged in providing residential apartment house management services to, inter alia, Queens Park Realty Corp. at the Queens Park residential apartment house complex in Queens, New York. I find that Provident is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

#### II. ALLEGED UNFAIR LABOR PRACTICES

##### A. *Background*

The parties agree that the following employees of Provident constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All service employees employed by the Employer at 98–11 Queens Boulevard, Queens, New York: but excluding all guards and supervisors as defined in Section 2(11) of the Act.

Since January 1980, the Union has been the designated exclusive collective-bargaining representative of the employees in the unit described above. Provident and the Union have been parties to successive collective-bargaining agreements, the most recent of which had a term from April 21, 1985, through April 20, 1988.

The contract names Provident Operating Corp. as the Employer. Daniel Benedict, the manager of Provident, testified that he signed the contract as Provident Operating Corp., agent for Queens Park Realty.[2] As is not uncommon in the real estate industry in New York City, Provident and Queens Park are family enterprises and a certain informality prevails in the legal forms pertaining to the relationship with the Union. Queens Park Realty owns not only the building at 98–11 Queens Boulevard which is the subject of the instant case but also a number of other buildings managed by Provident. The officers of Provident are Benedict, a Mr. Mazurek and a Mrs. Kastenbaum. Both Benedict and Mazurek are sons-in-law of Kastenbaum. Kastenbaum's late husband owned Queens Park Realty. According to Benedict it is unclear who now has legal ownership of Queens Park Realty; he testified that at the time of the instant hearing the mail for Queens Park was received at the home of Mrs. Kastenbaum.

In 1987, Leonard Williams, a unit employee at 98–11 Queens Boulevard, complained to the Union that he was not receiving the correct rate of pay under the collective-bargaining agreement. On May 21, 1987, the Union filed a notice to arbitrate Williams' pay claim under the contract; it named the Employer as Provident Operating Corp., c/o Queens Park Realty Corp., 98–11 Queens Boulevard. The next day, Williams was discharged. On May 28, 1987, the Union filed a

[2] The actual contract bears Benedict's signature and in the space identifying the Employer it names Provident Operating Corp. as ''Agent for Queens Park Realty Corp., 98–11 Queens Blvd.''

notice to arbitrate the discharge; it also alleged that Queens Park had established Atlantic Maintenance and Supply Co. as an alter ego and was using Atlantic Maintenance to pay its employees. The employer was named as Queens Park Realty Corp. and Atlantic Maintenance and Supply Corp. The record does not disclose why the name of Provident was omitted from the caption.[3]

On June 5, 1987, the Union filed unfair labor practice charges against Queens Park Realty. On July 21, 1987, by letter of the Acting Regional Director, some of the charges were dismissed: however, the charges relating to the discharge of Williams for complaining to the Union and the establishment of Atlantic Maintenance in order to avoid the collective-bargaining agreement were deferred to arbitration. On September 28, 1990, the arbitrator issued his award. He found that Provident and Queens Park shared the same offices and that Provident was the agent of Queens Park. The arbitrator found that the manager of the building owned by Queens Park also worked for Provident. He found that Williams had been receiving far less than one-half the amount of wages specified in the contract and that Williams had been discharged when he sought the help of the Union. The arbitrator further found that Queens Park had utilized Atlantic Maintenance to avoid complying with the terms of the collective-bargaining agreement. The award ordered the Employer to reinstate Williams with full seniority and backpay.

Before the arbitration described above took place, there was a substantial amount of litigation in the New York State Supreme Court relating to the Employer's efforts to resist the Union's demand for arbitration. This litigation culminated in a January 1989 order of the Court denying the Employer's motion for a stay and ordering it to proceed to arbitration. That litigation is relevant here for the reason that in all the proceedings, the Employer is named as Queens Park Realty. It is clear that the building concerned in the litigation and the arbitration is the same building that is at issue here and that the collective-bargaining agreement and the collective-bargaining unit are the very same ones with which we are concerned in the instant case. The parties have not explained why in the instant proceeding Provident as managing agent is listed as the Employer although in all the other proceedings, including the Union's unfair labor practice charge, Queens Park, the actual owner of the buildings is listed as the Employer. Indeed, counsel for the Charging Party Employer here, in some of the correspondence relating to the arbitration of the Williams' grievance, names both Queens Park and Provident Operating as the employers. Further, in a reply affirmation filed with the state court on August 16, 1988, in furtherance of the Charging Party's efforts to stay the arbitration in the Williams' case, Saltzstein affirms that Provident entered into the 1985–1988 collective-bargaining agreement as the agent for Queens Park Realty, although in the court proceedings on the stay only Queens Park is listed in the caption as the party resisting arbitration.

### B. *The Facts*

Robert M. Saltzstein, Esq., testified that he has represented Provident for 5 years. He is a specialist in labor law. Saltzstein stated that he negotiated the 1985–1988 contract with the Union. In that connection, he specifically recalled discussing the proposed contract with counsel for the Union, Ira A. Sturm, Esq.

On February 11, 1988, Saltzstein sent a collective-bargaining agreement termination notice to the Union; the letter was addressed to the Union's offices at One East 35th Street, in New York City.[4] On February 17, 1988, the Union sent a form letter signed by Kevin McCulloch, assistant to the president, from its office on 35th Street to Provident stating that it wished to negotiate a successor agreement to the one which would expire on April 20, 1988, and that it would contact the Employer shortly to commence negotiations. Apparently, the Union's form letter was just that; it was clearly not a response to Saltzstein's letter of February 11.

On June 23, 1988, Saltzstein sent another letter to the Union at One East 35th Street stating that effective June 30, 1988, Provident was ''terminating all obligations under the subject collective bargaining agreement.''[5] The letter recited that letters had been sent by both Saltzstein and the Union in February 1988, and it concluded that because Provident has not heard from the Union about negotiations, it was the Employer's position that the Union had ''waived by inaction any right that you may have had to negotiate a successor agreement.'' It became apparent at the instant hearing that the Union believed that it had sent the Employer a proposed successor agreement, but there is no record evidence that such a proposal was ever sent.

Saltzstein testified that he represented Provident in the litigation leading up to the Williams' arbitration and in the actual arbitration hearing. Those hearings were held for number of days ending on August 30, 1989. According to Saltzstein, on August 30, 1989, he was in the office of the contract arbitrator waiting for the hearing to begin. Neither the arbitrator nor union counsel had yet appeared but the union business agent, Ernesto Castro, was in the area waiting for the proceedings to begin. Castro was sitting with the grievant, Williams. Saltzstein asked to speak to Castro privately and the two men proceeded to an empty office. Saltzstein testified that he said to Castro, ''my client wanted to put an end to the labor dispute that was between Provident and Local 32B-32J, wanted to negotiate the terms of a renewal collective-bargaining agreement, which at that point had expired April 30th, the Apartment House agreement. And wanted to settle the underlying grievance that was being arbitrated that day.'' Saltzstein stated that Castro responded that the Union would not settle the grievance and ''that he would get back to me with respect to the negotiation of a renewal collective-bargaining agreement.''

Saltzstein testified that the Union has not communicated with Provident for the negotiation of a successor agreement since August 30, 1989. Provident has made no other oral or written request to negotiate since that date. It filed the refusal-to-bargain charge on January 31, 1990.

Saltzstein testified that he had never negotiated with Castro and he was unaware if Castro had ever negotiated a contract on behalf of the Union. Saltzstein has dealt only with Sturm for the negotiation of contracts with Local 32B-32J. Benedict testified that he leaves the negotiation of collective-

[3] Robert M. Saltzstein, Esq., the attorney for the Charging Party Employer here, represented Provident and Queens Park in the various proceedings described here.

[4] This letter was sent certified, return receipt requested.

[5] The letter was sent certified, return receipt requested.

bargaining agreements to Saltzstein. Benedict has dealt with Castro on personnel matters and to resolve grievances.

Castro testified that he was a business agent for the Union until September, 1989.[6] As a business agent, Castro serviced unit members working in over 200 buildings. He made sure that the employees got all the benefits they were entitled to under the contracts, he handled grievances and he attended arbitrations. The Union is represented by counsel at all the arbitrations to which it is a party; Castro did not present cases to the arbitrator. Castro's duties also included organizing activities. Castro testified that he does not negotiate collective-bargaining agreements, that he has no authority to negotiate, and that he has never told the Employer that he has any such authority.

When Castro was questioned concerning Saltzstein's purported demand to negotiate on August 30, 1989, he stated that he could not recall the conversation.[7] He could not recall what Saltzstein said to him nor what he replied. Although Castro said that if Saltzstein had requested negotiations he would have referred him to Sturm, this evidence cannot be determinative. In response to questions by counsel for the General Counsel, Castro said that if the Union wished to change some provision of a collective-bargaining agreement it would not convey that message through him; instead the union office that was responsible for negotiating contracts would send a letter to the employer. Castro explained that his job was not to negotiate new contracts but to see that existing contracts were enforced.

### C. *Discussion and Conclusions*

Both the General Counsel and the Charging Party contend that Saltzstein made a valid demand to negotiate when he spoke to Castro on August 30, 1989, and that the Union unlawfully refused to bargain by failing to respond to Saltzstein's demand. The Union maintains, among other arguments, that Saltzstein did not in fact ask Castro to bargain a new collective-bargaining agreement on August 30, 1989.[8] The Union urges that the conversation with Castro related to the grievance and not to the negotiation of a new contract, that the Union was represented by counsel at the arbitration and that if Saltzstein wanted to negotiate he would have asked the Union attorney about that. All prior negotiations had been conducted with a Union attorney. Finally, Saltzstein had written letters to the Union about negotiating a new contract and he well knew where to address a letter if he wished to negotiate a new contract.

The Union introduced, over the objections of counsel for the Employer and the General Counsel, the record of the proceedings relating to the litigation and arbitration of the Williams' case. In urging that I reject the Union's offer of these many documents and in urging that any mention of the whole Williams' litigation and arbitration was irrelevant, both counsel for the Employer and the General Counsel argued that the instant case and the Williams' case involved different employers and were not related; that is, that the instant case involves Provident although the Williams' case involved Queens Park Realty. Saltzstein urged on the record that ''matters involving Queens Park and the union do not reflect on Provident.'' He maintained a continuing objection to all matters relating to Williams and Queens Park Realty. In the brief filed on behalf of Charging Party, Saltzstein argued that the Williams' case was irrelevant as a defense to the instant complaint against Provident because there was no evidence showing common ownership or common control of labor relations as between Queens Park and Provident. The General Counsel also urged that Queens Park Realty ''is completely irrelevant to this proceeding.''

In order to find an unfair labor practice in this case, I must credit Saltzstein's testimony that he made an offer to bargain to Castro on August 30, 1989. Saltzstein testified very specifically that he told Castro, ''my client wanted to put an end to the labor dispute that was between Provident and Local 32B-J, wanted to negotiate the terms of a renewal collective-bargaining agreement And wanted to settle the underlying grievance that was being arbitrated that day.'' Clearly, Saltzstein testified that on behalf of his client Provident he wanted to settle the labor dispute with the Union by negotiating a new agreement and settling the grievance. This testimony says, without any doubt, that there was one client and that it would take a new contract and a grievance settlement to resolve the differences between Provident and the Union. Saltzstein did not testify, and it would be impossible to believe, that in one breath he both offered to negotiate on behalf of a named client and settle a grievance on behalf of an unnamed client. Of course, Saltzstein was under oath when he gave this testimony. Saltzstein also appeared as the attorney on behalf of Provident in the instant proceeding, and as an attorney, he was no less under an obligation to be accurate and truthful in his arguments and representations to the tribunal before which he was appearing. It is clear that Saltzstein's arguments in the instant case are inconsistent with his sworn testimony. Saltzstein argued that Provident and Queens Park were different employers, that Queens Park was irrelevant to this proceeding, that there was no common control of labor relations as between Queens Park and Provident and that any alleged unfair labor practices which might have been committed by Queens Park could not be raised as a defense to a failure to bargain by Provident. These arguments are inconsistent with Saltzstein's testimony that on behalf of a single client, Provident, he offered to negotiate a new contract and settle the grievance then being arbitrated.

[6] At the time of the hearing, Castro was recording secretary for District 7 of the Union. His duties as recording secretary do not involve the negotiation of contracts; he supervises the business agents in the field.

[7] While Castro was testifying, I observed that he has difficulty with the English language. English is obviously not Castro's first language; although he seems to understand it adequately, he does not speak it with ease. When Castro was testifying concerning fairly simple concepts, his English was easy to understand. However, when the questioning moved on to more complicated matters, Castro had trouble expressing more complex responses. For instance, Castro had trouble expressing conditional thoughts. When asked if he had a conversation with Saltzstein, Castro repeatedly used the phrase ''could it be'' in place of the more common locution ''it could be.'' Further, Castro did not use the proper form when attempting to explain what he would have said to Saltzstein if Saltzstein had indeed requested that he arrange for negotiation of a collective-bargaining agreement. I am convinced from my observation of Castro that he was a truthful witness and that he testified to the best of his recollection. I find that he did not attempt to mislead nor to shade his testimony. Any purported inconsistencies in his testimony that have been pointed out by counsel for the General Counsel and counsel for the Charging Party are in fact due to his lack of perfection in speaking English.

[8] The Union also argues that the charge should be deferred to arbitration under the contract. It further maintains that it had no duty to bargain with the Employer while the Employer was guilty of serious unfair labor practices such as paying its employees below the rates specified in the contract, failing to pay the health and welfare funds and establishing an alter ego to avoid its obligations under the collective-bargaining agreement. All the facts relating to this defense are found in the record of the Williams' case.

If there was no common control of labor relations then it would have been impossible for Saltzstein to offer, on behalf of his client Provident, to settle the grievance being arbitrated with Queens Park as the named employer. If Queens Park were in truth irrelevant to Provident, how could the settlement of the labor dispute between Provident and the Union require both the negotiation of a new contract and the resolution of the Williams' grievance against Queens Park? If Queens Park has nothing to do with Provident, as repeatedly urged by Saltzstein, then his testimony that he offered to settle the grievance against Queens Park at the same time that he offered to negotiate a new contract for Provident must be inaccurate. If I credit Saltzstein's arguments that Queens Park is irrelevant to Provident and that there is no common control as between Queens Park and Provident, then I cannot credit his sworn testimony that as the attorney for Provident he offered to settle a contract and a grievance that had been filed against Queens Park. If I credit Saltzstein's testimony about the wording of his offer on August 30, 1989, then I must find that he attempted to mislead me on numerous occasions during the instant proceeding.

I have carefully studied the record, including all the exhibits, and I have reflected at length on Saltzstein's testimony and on his demeanor. I have concluded that Saltzstein's testimony about his conversation with Castro on August 30, 1989, must be rejected as unreliable. It is commonly held that when a witness gives inconsistent and contradictory testimony, that testimony will be found to be unworthy of belief. Here, Saltzstein repeatedly made arguments that were wholly irreconcilable with his testimony. By making these arguments he undermined his own credibility. Further, I recall quite clearly Saltzstein's demeanor during the hearing. I am convinced that Saltzstein was bound and determined that the Union be found to have refused to bargain even if that required that Saltzstein give shaded testimony. During on-the-record colloquy among counsel at the hearing, Saltzstein twice expressed his personal anger at counsel for the Union because Saltzstein had failed to notice that the expiring contract contained what he referred to as an ''evergreen clause'' which apparently mandated a continuation of health and pension fund payments.[9] Based on Saltzstein's testimony and his demeanor throughout the hearing, I shall not rely on Saltzstein's testimony.

As a final comment, I note that the circumstances also lead me to conclude that it is extremely unlikely that Saltzstein would have made a request to bargain to Castro. Saltzstein is a labor law expert who has negotiated with the Union on previous occasions. Saltzstein has always negotiated with Sturm and he has never negotiated with Castro. When Saltzstein sent a notice of termination to the Union in February 1988, he sent it to the Union at its East 35th Street address. Further, on June 23, 1988, when Saltzstein wrote to notify the Union that Provident would no longer honor any obligations under the expired contract and that the Union had waived any right it had to negotiate a successor contract, Saltzstein again wrote to the Union at its East 35th Street office. It seems to me that when Saltzstein was of a mind to communicate with respect to negotiations, he wrote to the union offices. Saltzstein knew that a lawyer always represented the Union in negotiations and that a lawyer always represented the Union at arbitration hearings. Yet he would have me find that on August 30, 1989, he sought out a business agent with whom he had never negotiated and one who obviously had some difficulty with the English language and offered to negotiate a new contract. It is hard to believe this scenario. I find it most improbable that, having given the Union formal, written notice of the Employer's view that the relationship with the Union was at a virtual end, Saltzstein would then use an informal, oral method to rescind his earlier position and offer to negotiate.[10]

I find that there is no credible evidence that Provident requested negotiations with the Union on August 30, 1989. It follows that the Union cannot be found to have refused to bargain with Provident.

## CONCLUSION OF LAW

The General Counsel has not proved that the Union, Local 32B-32J, Service Employees International Union, AFL–CIO, refused to bargain with Provident Operating Corp. since August 30, 1989.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[11]

## ORDER

The complaint is dismissed.

[9] I need not speculate why a finding of refusal to bargain would help Provident in its efforts to resist payment the the funds nor what effect such a finding would have on future negotiations between Provident and the Union.

[10] Both the letter of February 11 and the letter of June 23, 1988, were sent by certified mail, return receipt requested.

[11] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.